

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
JOE VITALE) COMPLAINT AND CONSENT
) AGREEMENT/FINAL ORDER
Respondent.)
) Docket No. CWA-07-2004-0010
Proceeding under)
Section 309(a) and (g))
of the Clean Water Act,)
33 U.S.C. § 1319(a) and (g).)
_____)

COMPLAINT

Jurisdiction

1. This administrative action is being conducted pursuant to Section 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a) and (g), and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticide Division, EPA, Region VII.

4. The Respondent is Joe Vitale (Respondent), an individual residing in the State of Missouri, at 9606 Mill Hill Lane, St. Louis, Missouri 63127.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), provides that except as in compliance with certain specified provisions of the CWA, the authorized discharge of any pollutant into the waters of the United States by any person is unlawful.

6. Pursuant to Section 502(6) of the CWA, 33 U.S.C. § 1362(6), pollutants include fill materials such as "dredged spoil ..., rock, sand, [and] cellar dirt."

7. Section 404 of the CWA, 33 U.S.C. § 1344, requires a person to obtain a permit from the United States Army Corps of Engineers for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

9. Waters of the United States are defined by 40 C.F.R. § 232.2 and 33 C.F.R. Part 328 to include "wetlands."

10. "Wetlands" are defined at 40 C.F.R. § 232.2(r) as those areas that are inundated or saturated by surface or groundwater at the frequency and at duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

Factual Background

11. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. Respondent owns property located in portions of Section 33 and 34, Township 31 North, Range 8 East in an unincorporated area of Madison County, Missouri, at the end of Bollinger County Road 823 (Hereinafter referred to as "the property" or "Respondent's property").

13. In March 2001, Respondent and/or his employees and/or contractors, commenced construction of Trace Creek Dam. This construction caused the discharge of dredged or fill material into Trace Creek, and into wetlands adjacent to and associated with Trace Creek, waters of the United States.

14. Respondent did not have a CWA Section 404 permit for the discharge of fill material into waters of the United States.

Findings of Violation

15. The facts stated in paragraphs 11 through 14 above are herein incorporated.

16. Respondent's placement of the dredged and/or fill material into Trace Creek, and adjacent wetland, resulted in the discharge of pollutants from a point source into waters of the United States.

17. Respondent's discharge of fill material from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and is a violation of Section 301 of the CWA, 33 U.S.C. § 1311.

CONSENT AGREEMENT

18. Respondent admits the jurisdictional allegations of this Complaint and the Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

19. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

20. Respondent consents to the issuance of the Final Order and consent to the payment of a mitigated civil penalty set forth below.

21. Respondent consents to the mitigation set forth below in the Final Order.

22. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

23. Respondent and Complainant each agree to bear their own costs and attorney's fees.

24. Nothing contained in the Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

25. Each signatory of this Agreement certifies that he or she is authorized to enter into the terms of this Complaint and Consent Agreement/Final Order and to execute and legally bind Respondent to it.

FINAL ORDER

Pursuant to Section 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a) and (g), IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Five Thousand Five Hundred Dollars (\$5,500.00). Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this Complaint and Consent Agreement/Final Order. Payment made by Respondent shall identify the Respondent by name and docket number and shall be made by certified or cashier's check payable to the United States Treasury and remitted to:

Mellon Bank
EPA-Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

A copy of the transmittal letter and check shall be mailed to:

Rupert G. Thomas
Office of Regional Counsel
U.S. EPA Region VII
901 N. 5th Street
Kansas City, Kansas 66101

should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

2. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits. Specifically, respondent shall consult with the St. Louis District of the United States Army Corps of Engineers (Corps), and shall obtain all permits that the Corps determines are necessary to address the discharges and/ or to implement any plan approved pursuant to this Order.

3. Attached to and incorporated into this Final Order is the "Mitigation Plan", dated July 2002 (the Plan), prepared for Respondent by NPN Environmental Engineers, Inc. Respondent shall fully implement the Plan, as approved by EPA, within 120 days of receipt of this Order.

4. All documents required to be submitted to EPA by this Order, or by the approved Plan, shall be submitted by mail to:

Mr. Dewayne Knott
Chief, 404 Enforcement
U.S. Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, Kansas 66101

5. Respondent shall contact EPA when he has completed the work set forth in the schedule contained in the approved Plan and shall schedule an inspection by the EPA and the Corps to confirm that the mitigation has been satisfactorily completed, in accordance with the requirements of the approved Plan. If necessary, EPA will inform Respondent in writing of any additional work that is required to complete implementation of the Plan. Such additional work shall be completed by Respondent within thirty (30) days of receiving written notice.

6. Respondent's obligations under this Order shall terminate upon the date of EPA's notification to respondent of its successful completion of all work required by EPA pursuant to this Order.

PARTIES BOUND

7. This Final Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that its directors, officers, employees, contractors, consultants, firms or other entities acting under or for them with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESERVATION OF RIGHTS

8. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

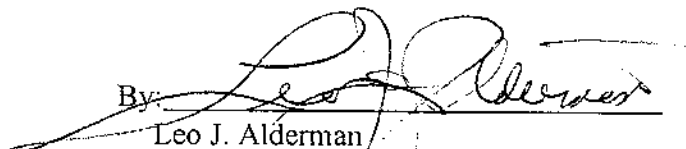
9. With respect to matters not addressed in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.

EFFECTIVE DATE

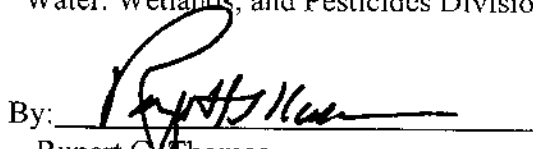
10. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

11/7/03
Date

By: 
Leo J. Alderman
Director
Water, Wetlands, and Pesticides Division

11/7/03
Date

By: 
Rupert G. Thomas
Attorney
Office of Regional Counsel

RESPONDENT:
JOE VITALE

11-14-03
Date

By: Joe Vitale
Title: Owner

IT IS SO ORDERED.

January 7, 2004
Date

Robert L. Patrick
Robert L. Patrick
Regional Judicial Officer

IN THE MATTER OF Joe Vitale, Respondent
Docket No. CWA-07-2004-0010

CERTIFICATE OF SERVICE

I certify that the foregoing Complaint and Consent Agreement/Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to
Attorney for Complainant:

Rupert G. Thomas
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Marty Schamber
NPN Environmental Engineers
927 Horan Drive
Fenton, Missouri 63026

Dated: 1/13/04


Kathy Robinson
Regional Hearing Clerk